DIRECTOR-GENERAL OF INLAND REVENUE v. L.C.W.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Ong Hock Sim F.J.) February 4, 1975]
[Kota Kinabalu — Federal Court Civil Appeal No. 76 of 1974]

Income Tax — Land originally bought to construct flats thereon for renting as an investment — Flats subsequently sold — Whether profits constitute gains or profits from a business — When land as stock-in-trade to be valued — Purchase price or market price — Income Tax Act, 1967, ss. 4(a), 17 and 35.

The respondent had originally bought a piece of land with the intention of constructing flats thereon for renting as an investment. Subsequently when he became short of ready cash he borrowed money to complete the building and made arrangements to sell the flats. The original purchase price of the land was $20,000 but it was shown as fixed assets and valued at $480,000 being the market value in 1963. The respondent was assessed to tax on the profits and on appeal to the Special Commissioners they held (a) that the profits constituted income in respect of gains or profits from a business and was assessable to tax under section 4(a) of the Income Tax Act, 1967; (b) by a majority, that the value of the land as stock-in-trade should be the original purchase price of $20,000. On appeal to the High Court, it was held that the Special Commissioners were wrong in their conclusions and should have held that the respondent was merely realising this investment and not trading or carrying on an adventure in the nature of a trade. The Director-General of Inland Revenue appealed to the Federal Court.

Held, allowing the appeal: (1) there was evidence in this case sufficient for the Special Commissioners to justify their conclusion that respondent was carrying on a concern in the nature of trade and therefore gains or profits derived therefrom were liable to taxation under section 4(a) of the Income Tax Act, 1967;

(2) the cost price of the land in relation to the business in this case was the value of the land at the time of appropriation to the business in 1963 and not the original value in 1953. The land should therefore be valued as stock-in-trade at $480,000.

Cases referred to:-

(1) *Edwards* v. *Bairstow* 36 T.C. 207, 224; [1956] A.C. 14.
(2) *Brace Girdle* v. *Oxley* [1947] 1 K.B. 349 at p. 358.
(3) *Leeming* v. *Jones* (1928-31) 15 T.C. 333.
(4) *Hudson's Bay Co. Ltd.* v. *Stevens* 5 T.C. 424.
(5) *The Alabama Coal, Iron, Land and Colonization Company Ltd.* v. *Mylam* (1926-27) 11 T.C. 232, 252 and 253.
(6) *Alberni's Case* 7 T.C. 629.
(7) *Reynold's Executors* v. *Bennett* 25 T.C. 401, 406, 407.
(8) *Shadford* v. *H. Fairweather & Co. Ltd.* 43 T.C. 291.
(9) *J. & R. O'Kane & Co.* v. *Commissioners of Inland Revenue* 12 T.C. 303, 347.
(10) *Watsons Bros.* v. *Hornby* 24 T.C. 506, 510.
(11) *Sharkey* v. *Wernhen* 36 T.C. 275.
(12) *Pilkington* v. *Randall* 42 T.C. 662.
(13) *Taylor* v. *Good* [1973] 2 All E.R. 785.
(14) *C.I.T.* v. *Shiribai Kooka* A.I.R. 1963 S.C. 477; (1962) 46 I.T.R. 86.

FEDERAL COURT.

Mohamad Nizar bin Idris (Senior Federal Counsel) for the appellant.

Datuk Thomas Jayasuriya for the respondent.

Lee Hun Hoe C.J. (Borneo): Not being satisfied with the tax assessment the taxpayer/respondent appealed to the Special Commissioners. In the event, by a majority of two to one the Special Commissioners dismissed the appeal and ordered that the assessment of income tax by the Inland Revenue Department be confirmed. The High Court allowed the appeal on the ground that the determination of the Special Commissioners were erroneous.

Respondent is a businessman dealing in timber and rubber as well as being an importer and exporter. He owns some rubber estates and a number of buildings in Sandakan and Kota Kinabalu, including five blocks of flats which he built some fifteen years ago. These flats have been let out on rent. He conducted most of his business under the name of U.C. House which also kept his accounts of his income from other sources. In 1953 respondent bought a piece of land for $20,000. This was surrendered to the Government by Deed dated May 21, 1958 in exchange for another piece of land now comprised in Sandakan Town Lease Nos. 607 and 608. Since the land was purchased in 1953 it had been treated as fixed asset and entered as such in the accounts of respondent. At the time he bought the land his intention was to construct flats for renting as an investment. He had no intention of developing the land or to construct flats thereon for sale.

In 1963 plans for the construction of buildings on the said land were approved by the Sandakan Town Board. Piling work commenced in October, 1964. By September, 1966 two twelve-storey blocks containing 24 flats were completed and came to be known as S. Apartment. Out of the total of 24 flats respondent sold 19 as at June 30, 1967. The remaining five flats retained by him were let out on rent. There was no advertisement of any kind inviting prospective purchasers for the flats. Most of the flats were sold to shareholders of S. Timber Ltd. of which respondent is the Chairman of the Board of Directors, and a few to acquaintances or friends of his or of the shareholders. The practice among developers in Sandakan also includes the taking of deposits and instalment payments made in accordance with the progress of construction or monthly. The first deposit in respect of the sale of the respondent's flats was taken on June 26, 1965. The same architect who planned and designed respondent's other buildings was engaged to plan and design the 24 flats. He assumed that the flats were for letting as was the case with the other buildings belonging to respondent so he planned and designed accordingly. However, during the course of the actual construction of the flats, minor alterations were made to some of the flats at the request of the purchasers of those flats. Respondent obtained a loan of $400.000 from Chung Khiaw Bank in either November or December, 1965 to finance the completion of the S. Apartment. The loan was fully repaid in 1968.

The financial year of respondent ended on 30th June. As stated earlier, the land comprised in Sandakan Town Lease Nos. 607 and 608 had been entered throughout as fixed asset in the accounts of the United Commercial House. However, in the year ending June 30, 1967 the said land was transferred from the fixed asset account to trading account of the S. Apartment Building at $480,000 being the market value for such land in 1963 and not the sum of $20.000 the price he paid for in 1953.

Before the Special Commissioners two issues were put forward for consideration. First, whether or not the profit received by respondent as at June 30, 1967

from the construction and sale of the 19 flats on land comprised in Sandakan Town Lease Nos. 607 and 608 constituted income in respect of gains or profits from a business and assessable to tax under section 4(a) of the Income Tax Act, 1967. Secondly, whether in ascertaining the adjusted income of the respondent from his business for the year of assessment, 1968 the value of the stock-in-trade consisting of the said land should be its original purchase price of $20,000 which the respondent paid in 1953 when he first acquired the land or whether it should be $480,000 which was the market value thereof when the respondent submitted plans for construction of the flats at the beginning of 1963.

The Special Commissioners were unanimous on the first issue. They answered the question in the affirmative. However, as regards the second issue two of the Commissioners held that the value of the land as an item of stock-in-trade should be $20,000. On the other hand, the third Commissioner considered that the value should be $480,000. I shall go into this matter in more detail later.

The question before the High Court was whether on the facts before the Special Commissioners there was evidence to support their unanimous decision on the first issue and their majority decision on the second issue and whether their decisions were correct in law. The learned judge thought that the Special Commissioners drew wrong conclusion from facts, particularly regarding respondent's activities as from 1963 onwards. He considered that the only inference which the Special Commissioners could properly draw was that when the respondent sold the 19 out of 24 flats he was merely realising his investment and not trading or carrying on an adventure in the nature of trade. Consequently, he allowed the appeal.

A perusal of the record shows clearly that the Special Commissioners have gone into the facts in some detail and with great care. Appellant submitted that the learned judge was wrong to disturb the finding of facts by the Special Commissioners unless such finding was so perverse that as a matter of law it could not stand. It is a question of fact whether respondent was carrying on a concern or adventure in the nature of trade. He maintained that on the evidence the Special Commissioners were right to find as a fact that the respondent was carrying on a concern in the nature of trade when he sold 19 out of 24 flats. Therefore, the income therefrom was properly assessable to tax under section 4(a) of the Income Tax Act, 1967.

In *Edwards* v. *Bairstow*[1] which was cited by both parties, Lord Simon at page 224 made it clear that: —

"For it is universally conceded that, though it is purely a question of fact, it may be set aside on grounds which have been stated in various ways but are, I think fairly summarised by saying that the court should take that course if it appears that the Commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained."

In cases of this nature it is always possible to cite numerous cases, in some of which the Commissioners have found an adventure or concern in the nature of trade and in others they have not. On one side one will find the court upholding the decision of the Commissioners while on the other side the court has reversed the decision of the Commissioners. The result is that it is not possible to draw a dividing line with any certainty. All that can be said is that each case must be decided according to its particular facts. I do not propose to go into all the cases cited by the parties but will only refer to those relevant for the purpose of this judgment.

The power of the High Court to hear appeals from Special Commissioners by way of case stated is clearly indicated under paragraph 34 of Schedule 5 of the Income Tax Act, 1967. It sits only to review the decision of the Special Commissioners on points of law, being bound by the facts which they have found, provided always there is evidence on which they could come to the conclusion of facts at which they have arrived.

At page 229 in *Edwards* v. *Bairstow*[1] Lord Radcliffe discussing the divergence in principle between the English and Scottish Courts said:—

"I think that the true position of the court in all these cases can be shortly stated. If a party to a hearing before Commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them."

After discussing the various circumstances in which the court can intervene, he summarised them thus:—

"I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur."

The distinction between primary facts and conclusions from those facts are discussed by Denning J., as he then was, in *Brace Girdle* v. *Oxley*[2]: —

"The question whether a determination by the tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal which sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law.... The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, ..."

With respect to the learned judge, I cannot say that all his criticisms against the Special Commissioners can be supported. The Special Commissioners made a specific finding of facts (paragraph 13) as follows:—

"The plans for the construction of flats having been approved by the Town Board in 1963, the piling thereof commenced in October, 1964. In his evidence before us the appellant (now respondent) stated that in 1965 he changed his intention of using the land and the flats as an investment and decided to sell some of the flats. He said that he changed his intention because of the Indonesian confrontation and his own financial difficulties."

They then gave their reasons for being unable to accept that part of respondent's evidence. They thought that respondent could have disposed of his other assets or part of the other five blocks of flats to lessen his financial difficulty. Everyone agreed that this was pure conjecture on the part of the Special Commissioners as to what assets respondent might dispose of to ease his financial difficulty. It is clearly a matter for the taxpayer to decide which of his assets he wants to dispose of to tie over his financial difficulty. It is not the concern of the Special Commissioners.

The learned judge was right to say that he could not understand why the Special Commissioners should state that the taxpayer did not show how and in what manner he was in financial difficulties. The reason is that the Special Commissioners specifically found (paragraph 7(i)) that:—

"The construction of the S. Apartment was substantially financed by the appellant. However, he obtained a loan of approximately $400,000.00 from the Chung Khiaw Bank in November/December 1965 to finance the completion of the building and this loan was fully repaid in 1968."

The taxpayer was in financial difficulties in the sense that he was short of ready cash and not in the sense that he was on the verge of bankruptcy judging by his various assets. He borrowed money to complete the building. In that sense he was in financial difficulties.

Although the Special Commissioners have rejected the respondent's evidence for reasons which cannot be supported they have also, as a matter of caution, expressed (paragraph 15) that:—

"On the facts before us we were of the opinion that, whatever intention the appellant originally might have had in respect of the land when he purchased it in 1953, his subsequent conduct from 1963 onwards when the plans for the construction of the S. Apartment were approved, showed that he was engaging himself on a concern in the nature of trade."

Reference was made to the case of *Leeming* v. *Jones*[3] concerning the purchase and sale of rubber estates. There, Rowlatt J. sent the case back to the General Commissioners to decide whether there was or not a concern in the nature or trade. Pursuant to the learned judge's order they decided that the transaction was not a concern in the nature of trade, therefore, there was no liability to assessment. Though Rowlatt J. and the Court of Appeal felt very strongly that on the facts there should have been a finding there was an adventure in the nature of trade they decided not to interfere with the finding of facts by the Commissioners as they considered the facts were for the decision of the Commissioners. Lord Hanworth M.R. gave his reasons at page 346: —

"... It would make an inroad upon their sphere if one were to say in a case such as the present that there could only be one conclusion. The Commissioners are far better judges of these commercial transactions than the courts, and although their attention has been drawn to what happened, they have in their final case negatived anything in the nature of an adventure or trade."

Respondent had stated that in 1965 he changed his intention of using the land and the flats as an investment and decided to sell some of the flats. The reasons he gave for changing his intention were the Indonesian confrontation and his own financial difficulties. I do not see that the reasons for his change of intention would change the colour of the transaction, namely, the disposal of the flats insofar as it relates to the question whether or not he was liable to tax. I think the crucial period is the moment he intended to sell the flats in 1965 to the time he sold the last flat as at June 30, 1967. An organisation does not necessarily mean a partnership, a syndicate or a company. It may take the form of an individual. In this case it was found as a fact that the business and commercial transactions in relation to the various sole proprietorship business of the taxpayer were done in the name of the U.C. House. Here, this is a clear case of the existence of an organisation. True there was no advertisement. But, then why should he advertise and incur unnecessary costs when he managed to sell the number of flats he intended to dispose of to shareholders of his company and to friends and acquaintances of his or his shareholders.

After he decided to sell the flats in 1965 he accepted deposits and building construction and other related activities were carried on. In fact, purchasers were permitted to request respondent's architect to make minor alterations to their flats. In the same year he had borrowed money from a bank to complete the construction of the building. He paid off the bank in 1968, after he had sold the 19 flats in 1967. These are some of the activities. The design and plan of the building and the construction were under the charge of his architect. His accounts and most of his business were looked after by the U.C. House. So, there one can see the existence of special skill. Opportunities in connection with the sales of articles may be said to exist in that he did not have to advertise for buyers. Also, the nature of the assets easily lent itself to commercial transactions. Thus, even without advertisement he had no difficulty in selling 19 of the 24 flats. I am, therefore, with respect to the learned judge, unable to agree when he said that none of the conditions laid down in *Leeming* v. *Jones* could be said to be present.

This is not a case of merely selling one single flat but it involves the sale of 19 flats over a period of time from 1965 to 1967. That the question of isolated transaction does not arise in this case has clearly been accepted by the parties themselves. So, the question here is whether he was carrying on a trade, an adventure or concern in the nature of a trade. If the answer is in the affirmative, then profits arising therefrom are annual gains or profits and assessable to income tax.

In *Hudson's Bay Co. Ltd.* v. *Stevens*[4] a trading company held a lot of land but sold a part of the land and it was held that the company was selling its capital and not trading in the land. As the Master of the Rolls said in that case at page 436: —

"The real question is whether this money can be regarded as profits or gains derived by the company from carrying on a trade or business. In my opinion it cannot. The company are doing no more than an ordinary landowner does who is minded to sell from time to time, as purchasers offer, portions suitable for building of an estate which has devolved upon him from his ancestors. I am unable to attach any weight to the circumstance that large sales are made every year. This is not a case where land is from time to time purchased with a view to resale; the company are only getting rid by sale as fast as they reasonably can of land which they acquired as part of a consideration for the surrender of their Charter."

The learned judge said that the taxpayer was not a property developer, but was a businessman, estate owner and a landlord. He thought that the course taken by the taxpayer from 1963 onwards was wholly consistent with the position of a landowner dealing with his property and realising his investments in order to lessen his burden with the result that any surplus on the sale would not be liable to tax. The learned judge said Rowlatt J. in *The Alabama Coal, Iron, Land and Colonization Company Ltd.* v. *Mylam*[5] said "merely realising is not trading." Rowlatt J. was of course criticising the language used by the Commissioners. He said at page 252: —

"Some criticism I think may be fairly made upon that language, but it is only really verbal. Of course when they say 'trade of realizing', if they are using the word 'realizing' in its very correct sense you get a contradiction in terms because merely realizing is not trading. It is no good saying it is a trade of realizing. But I think what they mean is: they have taken a process of realizing and embedded it in a trade so that in the course of carrying on a trade they have in fact done some realizing."

Rowlatt J. also stated at page 253:—

That even a landowner may be liable for trading in land under certain circumstances is made clear by Lord Justice Farwell. I think, in the *Hudson's Bay* case, because he says: 'A man who sells his land, or pictures, or jewels, is not chargeable with Income Tax on the purchase-money or on the difference between the amount that he gave and the amount that he received for them. But if instead of dealing with his property as owner he embarks on a trade in which he uses that property for the purposes of his trade, then he becomes liable to pay, not on the excess of sale prices over purchase prices, but on the annual profits or gains arising from such trade, in ascertaining which those prices will no doubt come into consideration.' Therefore, even a person in the position of a landowner can use his existing lands, to put it shortly, as an article of trade, if that is the true view of what he has done with them."

He considered *Hudson's Bay Case*[4] was a special case owing to the antecedents of the land for one thing and so also *Alberni's Case*[6] was a special case. He held that the company had conducted a trading concern as opposed to mere realization and dismissed the appeal. I think on the facts the same can be said in the case under consideration for here he developed the land by building flats which he sold as articles of trade.

The question in this appeal is really whether there is evidence on which the Special Commissioners could reasonably come to the conclusion that respondent was carrying on a concern in the nature of trade. If the Special Commissioners had confined themselves to the finding of facts there would be no ground for the learned judge to question their decision. This was also what precisely happened in *Reynold's Executors* v. *Bennett*.[7] There Mr. Reynolds was a motor engineer and carried on that business at East Ham. In 1933 he formed a company, W. J. Reynolds (Motors) Ltd. to take over his business. In 1929 Mr. Reynolds entered into partnership with a Mr. Hickman for the purpose of acquiring and developing land at Chadwell Heath. The partnership developed the land for building by constructing roads, sewers and so forth. Between December, 1929 and October, 1933 they were able to dispose of the whole of the property in the building plots. The profits of the enterprise were divided between the two partners and duly brought into their Income Tax returns and taxed. Macnaghten J. said: —

"On those facts the Special Commissioners drew the inference and held as a fact that Mr. Reynolds, in his purchase and sale of Wangye Farm and Hill Farm, was engaged in an adventure in the nature of trade; and the question before me on this appeal is whether there is any evidence on which the Special Commissioners could reasonably come to that conclusion. It is conceded that if the Special Commissioners had confined themselves to their finding of fact, there would be no ground for questioning their decision. But the Commissioners, perhaps incautiously, did not confine themselves to merely stating the conclusion of fact at which they arrived: they proceeded to enter into a consideration of the facts which had been proved before them and the influence which those facts had upon their minds."

Macnaghten J. then went on to deal with what the Special Commissioners had stated and concluded:—

"But I cannot read this sentence — 'it must be inferred that the intention to do so was in his mind, although there was no evidence that it was dominant', as qualifying or setting aside the finding of fact at which the Special Commissioners arrived, namely, that Mr. Reynolds in his purchase and sale of the two properties was engaged in an adventure in the nature of trade; and therefore, as it is a question of fact which cannot be disturbed by the court as long as there is evidence on which the Commissioners could reasonably come to that conclusion, the appeal, in my judgment, fails and must be dismissed with costs."

The learned judge thought that the Special Commissioners were wrong because they did not place sufficient emphasis on their finding of fact that "when the appellant (now respondent) bought the said land in 1953 his intention was to construct flats for the purpose of renting them out as an investment. He had no intention of developing the land for sale or to construct thereon for sale." On that finding he concluded that the only inference which the Commissioners could properly draw was that when the taxpayer sold 19 out of a total of 24 flats he was merely realising his investment and not trading or carrying on an adventure in the nature of a trade. If those were all the facts then I agree such would be the only reasonable conclusion. Clearly, in the above passage the Commissioners were referring to the position in 1953. The position was no more true in 1963 when respondent's plan for S. Apartment was approved by the Town Board, followed by piling work in 1964 and culminating in the completion of the building in 1966. In 1965 he was in financial difficulty so he borrowed money from the bank. In that same year he also changed his intention to retain the flats for renting as an investment. He decided to sell the flats albeit to shareholders of the company, friends and acquaintances of his or his shareholders. He accepted their deposits as any other developers or owners would do. The purchasers were allowed to instruct his architects to make alterations to their flats. On June 30, 1967 the said land entered as fixed asset was transferred to the trading account of the S. Apartment at the market value in 1963 of $480,000 and not $20,000 the original price he paid for the said land in 1953. All these are primary facts as found by the Commissioners and are not in dispute. Even if the Commissioners have been wrong in some of their inferences as found by the learned judge their finding of primary facts have not been found to be wrong. Indeed, such finding cannot be disturbed. The result is that the Commissioners are entitled to rely on the primary facts and say that on those facts they were of the opinion that respondent was carrying on a concern in the nature of trade.

It cannot be said that the Special Commissioners reached their conclusion that respondent was carrying on a concern in the nature of trade merely on the transfer of the land from fixed account to trading account in 1967. They have clearly taken other primary facts found by them into consideration. The way the U.C. House kept the account of respondent in respect of the land is admissible to show intention. However, such evidence must be weighed against other available evidence to enable the Special Commissioners to decide the nature of the transaction. As Buckley J. said at page 299 in *Shadford* v. *H. Fairweather & Co. Ltd.*[8]: —

"For, however genuinely the accounts may have been framed by those responsible for them, and however carefully they may have been studied by those responsible for auditing them, the other evidence may show that in fact they do not truly indicate the nature of the relevant operations."

The important thing is to see whether the acts and conduct of the respondent in relation to the business amount to trading. In the words of Buckmaster in *J. & R. O'Kane & Co.* v. *The Commissioners of Inland Revenue*[9]: —

"... yet the intention of a man cannot be considered as determining what it is that his acts amount to; and the real thing that has to be decided here is what were the acts that were done in connection with this business and whether they amount to a trading which would cause the profits that accrued to be profits arising from a trade or business?"

In my opinion there was evidence in this case sufficient for the Special Commissioners to justify their conclusion that respondent was carrying on a concern in the nature of trade and, therefore, gains or profits derived therefrom are liable to taxation under section 4(a) of the Income Tax Act, 1967. Consequently, with respect to the learned judge, I think the appeal should be allowed and the judgment of the learned judge reversed and the majority decision of the Special Commissioners on the first issue be restored. The second issue was not dealt with by the learned judge in the view he took on the first issue.

Since I have allowed the appeal on the first issue, it is necessary to deal with the other matter concerning the ascertainment of adjusted income. For the purpose of accountancy respondent adopted June 30 as the end of his financial year. Since he bought the said land in 1953, it had been entered throughout as fixed asset in the accounts of the U.C. House. However, in the year ending June 30, 1967 the said land was transferred from fixed asset account to the trading account of S. Apartment and the value thereof was entered as $480,000, the market value in 1963 and not $20,000 the original purchase price he paid for the said land in 1953. On this issue the Special Commissioners were not unanimous. Two of them favoured the contention of the appellant that the proper value to be placed on the said land as stock-in-trade should, in accordance with the proviso to section 35(3)(a) of the Income Tax Act, 1967 be $20,000 which was the cost to the taxpayer for the said land in 1953 and not the higher figure of $480,000 which was the market value of the land at the beginning of 1963. The third Special Commissioner took the view that the said land was transferred from the fixed capital account to the trading account of S. Apartment as stock-in-trade as at June 30, 1967 and that the realisable or market value of $480,000 was entered in respect of the said land. Therefore, the sum of $480,000 would be the true cost of the stock of land to the taxpayer's business relating to the S. Apartment and not the original cost. So, he considered that the value of the said land as an item of the stock-in-trade of the taxpayer's business should be $480,000 at the beginning of the basis period for the year of assessment 1968 and not $20,000. He would allow the appeal and direct the notice of assessment dated March 6, 1971 in respect of the respondent be amended accordingly.

Section 35 of the 1967 Act deals with stock-in-trade. The relevant provisions of the section reads:—

"35(3) Subject to subsections (4) and (5) —

(a) the value of any particular item of the stock at the end of the relevant period shall be taken to be —

(i) an amount equal to its market value at that time: *provided that in the case of any item of the stock consisting of immovable properties, stocks, shares or marketable securities, the value thereof at the end of the relevant period shall be taken to be an amount equal to its cost price to that relevant person or its market value at that time, whichever is lower;* or

(ii) ....

(b) the value of any particular item of the stock at the beginning of the relevant period (except where the business was commenced by the relevant person in the relevant period) shall be taken to be an amount equal to its value as ascertained under paragraph (a) at the end of the basis period for the year of assessment immediately preceding the year of assessment to which the relevant period relates."

I have emphasized the proviso. I should mention that section 35(3)(a)(i) was amended by the addition of the proviso in paragraph (1) by Act A 108 of 1972 which came into force on April 4, 1972. However, by section 2(2) of the said Act A 108 of 1972 it is provided that the amendments specified shall have effect or shall be deemed to have effect on dates as may be specified in the said schedule. Paragraph (2) of the Schedule to the amendment of section 35 reads:—

"(2) The amendment in paragraph (1) shall be deemed to have effect for the year of assessment 1968 and subsequent years of assessment."

For the respondent, it was contended that the proviso did not apply and if it did apply it did not have the effect attributed to it. The proviso is concerned with the amount to be brought in as representing the value of stock at the end of a basis period. But, here the question is the amount to be brought at the beginning of a basis period as opposed to the end of a basis period. That was in the mind of the third Special Commissioner when he said that "land as an item of stock-in-trade of the taxpayer's business should be $480,000 at the beginning of the basis period for the year of assessment 1968 and not $20,000." Therefore, respondent submitted that the proper sections to apply was section 35(3)(b). If one were to read paragraph (b) in isolation it would seem to have the effect that the opening figure for stock at the beginning of the basis period for the year of assessment 1968 would be the closing figure ascertained in paragraph (a) for the basis period for the year of assessment 1967. I do not think that could be the position since section 1(3) of the 1967 Act makes it very clear that the Act shall have effect for the year of assessment 1968 and subsequent years of assessment. There would seem to be no basis period for the year of assessment 1967

under the Act. It is, therefore, necessary to refer to the transitional and saving provisions under Schedule 9 of the 1967 Act, particularly paragraph 17 where the relevant provision reads: —

"17. Where the relevant period for the purposes of section 35 is a basis period for the year of assessment 1968, subsection 3(b) of that section shall be so modified that the value of any particular item of the stock at the beginning of the relevant period (except where the business was commenced by the relevant person in the relevant period) shall be taken —

(a) to be an amount equal to the value which would be arrived at if subsection 3(a) were applied at the beginning and not at the end of the relevant period...."

Section 35(1) speaks of ascertaining the adjusted income of a person from his business. The sum of $480,000, the market value of the land in 1963 was chosen, it would seem to coincide with the approval of the plan for S. Apartment by the Town Board. At that time respondent also owned five blocks of flats which he rented out and he intended to do the same with the S. Apartment. In computing the profits of his business it would seem logical that he would have to assess the value to be given to the land in respect of his business concerning the S. Apartment in 1963. In respect of land the market value would be the reasonable price. The rise in the value of the land has nothing to do with his trading activities. Any sum above the original price he paid for the land in 1953 should be treated as capital gain which, in any case, is not assessable to income tax. In support the cases of *Watsons Bros.* v. *Hornby;*[10] *Sharkey* v. *Wernher;*[11] *Pilkington* v. *Randall*[12] and *Taylor* v. *Good*[13] were cited.

The proviso to section 35(3)(a)(i) refers to "its cost price to the relevant person." Account must be taken of section 35(1). "Relevant person" seems to indicate a person in relation to his business. The cost price referred to by the proviso would mean the cost to the business of that person, that is to say, the value of the land at the time of appropriation in 1963. The true value to the business is the market value in 1963 and not the original value in 1953. The proviso is a codification of accepted accounting principle in business or commerce. Any computation of profits which is contrary to accepted principles must be regarded as unreasonable. When respondent converted his capital assets into stock-in-trade and started dealing in them the taxable profit on the sales must be determined by deducting from the sale proceeds the market value of the assets at the date of conversion into stock-in-trade since that is the cost to his business and not the original cost to him. See *C.I.T.* v. *Shiribai Kooka.*[14] There the assessee purchased shares for investment and on April 1, 1945 she converted these into her stock-in-trade and carried on business in shares. Some of these shares were sold in the assessment year 1947-48. Held that the assessable profits were the difference between the sale price and market value of the shares prevailing on April 1, 1945. In that case S. K. Das J. delivering the judgment of the court referred in detail to the case of *Sharkey* v. *Wernher*[11] concerning the profit made from a stud farm. There the House of Lords restored the decision of Vairsey J. who based his decision on *Watson Bros.* v. *Hornby*[10] and held that the market value of the five horses transferred from the stud farm was the proper figure that should be credited in the accounts. S. K. Das J. said at page 482: —

"What then is the basis for computing the actual profits in the present case? We think that the basis must be, as the High Court has put it, the ordinary commercial principles on which actual profits are computed. We think that the approach of the High Court was correct and normally the commercial profits out of the transaction of sale of an article must be the difference between what the article cost the business and what it fetched on sale. So far as the business or trading activity was concerned, the market value of the shares as on April 1, 1945 was what it cost the business. We do not think that there is any question of a notional sale here. The High Court did not create any legal fiction of a sale when it took the market value as on April 1, 1945 as the proper figure for determining the actual profits made by the assessee. That the assessee later sold the shares in pursuance of a trading activity was not in dispute; that sale was an actual sale resulting in some profits. The problem is how should those profits be computed? To adopt the language of Lord Radcliffe, the only fair measure of assessing trading profits in such circumstances is to take the market value at one end and the actual sale proceeds at the other, the difference between the two being the profit or loss as the case may be. In a trading or commercial sense this seems to us to accord more with reality than with fiction."

For reasons given, I am of the view that the minority decision of the Special Commissioners on the second issue should be accepted and the assessment to be amended accordingly. The result is that the appeal is allowed with costs and the decision of the learned judge on the first issue is set aside and the decision of the Special Commissioners on the first issue is restored.

Ong Hock Sim F.J. concurred.

Suffian L.P. (read by **Lee Hun Hoe C.J.**): There are two issues here. As to the first issue, I am quite clear in my mind that the appeal should be allowed with costs, for the reasons given by the learned Chief Justice, Borneo.

As to the second issue, I was not quite sure, because the provisions of the Income Tax Act, 1967, cited to us, and reproduced in the judgment of the learned Chief Justice are not all that clear, which is not a bit surprising considering that we are dealing with a very technical branch of the law, and I took the trouble to draft a separate judgment. I thought that I was going to dissent and accept the arguments advanced on behalf of the Revenue, but after much cogitation I have decided in the end, with respect, to go along with the learned Chief Justice's conclusion that the value to be put on this land should be $480,000 (its market value in 1963), not $20,000, the price paid for it by the taxpayer when he bought it in 1953.

The order of the court is therefore this, that on the first issue the order of the learned judge is hereby set aside and the decision of the Special Commissioners restored, and that on the second issue the minority decision of the Special Commissioners should be accepted, and that the assessment be amended accordingly.

The respondent to pay the taxed costs of this appeal.

The appellant's deposit to be returned to him.

Appeal allowed.

Solicitors: *Thomas Jayasuriya & Co.*